No. 80-979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE COMMONWEALTH OF PUERTO RICO and THE ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PUERTO RICO,

Petitioners,

-against-

THE S.S. ZOE COLOCOTRONI, MARBONANZA COMPAÑIA NAVIERA, S.A., COLOCOTRONI LTD., COLOCOTRONI BROTHERS, S.A., THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG) and THE WEST OF ENGLAND SHIP OWNERS MUTUAL INSURANCE ASSOCIATION (LONDON) LIMITED,

Respondents.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Defendants, respondents to this cross-petition, incorporate herein by reference the statement of the case set forth in the petition for a writ of certiorari, No. 80-758. The specific facts relevant to the question presented in the cross-petition are set forth below.

1. The District Court's Damage Award for "Replacement" of Marine Organisms

Plaintiffs' third and final amended complaint alleged damage to "fish and wildlife" (A316)[1]; however, twelve days before the trial commenced, plaintiffs withdrew this claim and substituted a claim for damages for "replacing dead mangrove root animals." (A519).[2] During the trial, plaintiffs failed to offer any evidence of damage to mammals, fish, birds, reptiles or commercially valuable invertebrates.[3]

There was slender evidence of minimal damage to some invertebrates, mostly marine worms and fiddler crabs, but no evidence of any tally of the number of organisms killed other than plaintiffs' expert's sighting of about 200 dead fiddler crabs.[4] (Tr. 261F; A886). Plaintiffs conceded that the marine animals killed by the oil spill would be replenished through the processes of nature once the contamination had been reduced sufficiently for them to exist.[5] (Tr. 286F, 2425-2429, 2439). Indeed, in July, 1973, less than four months after the oil spill, plaintiffs' biologists found that "animals were returning to the mangrove areas" (A876) and that there already had been "an increase . . . in the number and species of crabs." (A884).

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1. Page references to the appendices submitted to the Court of Appeals are cited as follows: Appendix: "A__"; Supplemental Appendix: "SA__"; Appendix-Trial Transcript: "Tr.__." Page references to the Appendix to the petition for a writ of certiorari, No. 80-758, are cited "__a."

2. A damage action brought by commercial fisherman against defendants was settled prior to trial for $55,000. Jorge Acousta Lopez, et al. v. Marbonanza Compañia Naviera, S.A., et al., D.P.R. No. 303-74. (Tr. 1072).

3. Notwithstanding, plaintiffs now refer, *inter alia,* to "fish," "eels" and "turtles" (Cross-Petition at 12, 13, 14).

4. Plaintiffs' assertion that "[i]t is undisputed that millions of marine animals died as a result of the oil spill" is false. (Cross-Petition at 18). Nor is there any proof to that effect.

5. As the district court acknowledged, the contaminating petroleum residues have been attacked by bacteria and the elements and ultimately will be completely decomposed and rendered harmless. (83a-84a).

As their last witness, plaintiffs called Dr. Philip E. Sorensen, a self-styled environmental economist and skillful mathematician. In an exercise which demonstrates very well the hazards of total reliance on numbers, Dr. Sorensen concocted an imaginary claim for over $5.5 million in damages for "replacement" of marine organisms, which was accepted verbatim by the district court.

The data upon which Dr. Sorensen performed his mathematical gymnastics came from a superficial survey by plaintiffs' biological experts, the sole purpose of which was to study the effect of high concentrations of oil on marine organisms living in the sediments beneath mangrove trees. (Tr. 687; A945). Six ten-centimeter diameter core samples of the sediments were taken at four spots at Bahia Sucia where plaintiffs' chemist had found very high concentrations of oil,[6] and similar samples were collected from four points in a purported "control" area at Montalva Bay. The marine organisms found in each sample were identified and counted, and the results from the four Bahia Sucia "stations" were compared with the results from the control "stations". Surprisingly, more marine organisms were found in the samples collected at one of the polluted Bahia Sucia stations (Station 1) than at its paired control station. (A952). As expected, only one organism was found among the soil samples collected at the three other Bahia Sucia stations, while their paired control stations yielded 162 organisms, of which 113 were marine worms. (A955, A957, A959).

Dr. Sorensen disregarded the data from Station 1, which did not suit his purpose, and manipulated the data gathered at the three other stations as set forth in Appendix I hereto. First, based on an unsupported assumption that the Bahia Sucia sampling stations were biologically

6. Oil remained at these locations because they were sheltered from the flushing action of the tides. (A945).

identical to their paired control stations, he calculated an average decline in the number of marine organisms per Bahia Sucia station of 53.67, by subtracting 1 from 162 and dividing by 3. Then, using a mathematical conversion factor of 85,877.34, he extrapolated these numbers to one acre, calculating a surmised loss of 4,605,486 organisms per acre. Multiplying again by "20 acres", Dr. Sorensen calculated that 92,109,720 marine organisms had been lost.[7] (A1442-A1443). Plaintiffs' own evidence showed that the Bahia Sucia sampling stations were not representative of even one acre, much less 20 acres.[8] (*E.g.*, Plaintiffs' Exhibit 29; A1390). Nevertheless, the district court held that exactly 4,605,486 marine organisms had been lost in each of 20 acres, a total of exactly 92,109,720 marine organisms. (85a).

The district court also held that the 92 million marine organisms supposedly lost had a "replacement cost" of six cents each, on the basis of hearsay testimony by Dr. Sorensen. The $.06 figure was contrived by Dr. Sorensen, who testified that he had been guided by "about a dozen" biological supply catalogues, not offered into evidence, and a settlement agreement between the State of California and Pacific Gas & Electric Company involving the Diablo Canyon nuclear reactor, not in evidence. (Tr. 997). Although none of the biological supply catalogues offered for sale any species of marine organisms occurring at Bahia Sucia, Dr. Sorensen asserted that the catalogues showed

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7. The total conversion factor for this calculation was 1,717,546.80. (Appendix I). Thus every organism actually collected counted for over 1.7 million in the Sorensen total of 92,109,720.

8. Dr. Sorensen testified that he had been told that the Bahia Sucia sampling stations were representative of a 20 acre area (Tr. 1034-1035), when in fact they had been selected for study because they were *not* typical but were very heavily oiled. (A945, A967; Tr. 687.) Moreover, the "20 acre" area included over 16 acres in East Mangrove, which the district court found not to have been damaged by the oil spill. (A1389-A1390; Tr. 1032-1039; 46a, n.25).

that a market existed for those marine organisms and that the organisms could be sold for $.06 each. (Tr. 997-1001; A1443).

The Diablo Canyon settlement provided for the donation of $375,000 by PG&E to California in six installments to fund a study of abalone farming in settlement of all claims of any kind arising from the nuclear reactor project. (A2233). In a blatant misrepresentation of this agreement, which was not produced by plaintiffs, Dr. Sorensen testified that PG&E had paid damages of $1,000,000 for "killing of a large number of marine animals of a similar character at Diablo [Canyon]" pursuant to "120 pages of itemized prices," prepared by reference to biological supply catalogues.[9] (Tr. 997-998; A1443). In an affidavit submitted by plaintiffs in response to defendants' motion for relief from judgment, Dr. Sorensen recanted this testimony, admitting that his erroneous testimony had been based on hearsay. (A3023).

There is no evidence in the record that any of the species of marine organisms found in the West Mangrove area has ever been collected, sold or used for any purpose. (Tr. 2768). Nor is there any evidence that the Commonwealth has ever regulated the capture, killing or sale of such organisms. The marine organisms are free for the taking, but since there is no market for them, they are left undisturbed.

To calculate damages, Dr. Sorensen multiplied 92,109,720 marine organisms times $.06, yielding $5,526,583.20. (A1443). This exact figure was adopted by the district court as damages for the "cost of replacing" marine organisms killed by the oil spill. (85a).

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9. The State of California had prepared a list of all species of flora and fauna occurring along its Pacific coast with "estimated values" for everything from algae to whales. (A3022). This list was disregarded by PG&E in arriving at the settlement. (A2229). It does not include any species of marine organisms found at Bahia Sucia, Puerto Rico.

2. The Court of Appeals' Reversal of the Damage Award for Loss of Marine Organisms

Defendants urged the court of appeals to reverse on various grounds, including the absence of any authority supporting the district court's replacement cost theory of damages and the clear error of the district court's findings with respect to the number of acres damaged, the number of marine organisms killed, and the monetary value of the animals. The court of appeals did not reach the question whether these findings of fact were clearly erroneous, for it rejected the theory upon which damages had been awarded. (43a-45a).

Since plaintiffs acknowledged that they had no plan to purchase marine organisms for reintroduction into the sediments and that the organisms could not survive where oil still was present, the court of appeals termed the $5.5 million award a "purely abstract recovery." (45a). The court also recognized the distinction between restocking "wild birds or game animals or such other creatures as would not be expected to regenerate naturally within a limited period of time even with appropriate restoration" and "small, commercially valueless creatures which assertedly would . . . probably replenish themselves naturally if and when restoration—either artificial or natural—took place." (44a).

REASONS FOR DENYING THE WRIT

THE QUESTION PRESENTED FOR REVIEW DOES NOT MEET THE REQUIREMENTS FOR GRANTING CERTIORARI

It is noteworthy that even plaintiffs agree that this Court should review the court of appeals' decision on environmental damages. However, the question presented by the cross-petition clearly does not meet this Court's standards for granting certiorari. The court of appeals' ruling vacating the damages awarded for "replacing"

marine organisms is not in conflict with decisions of this Court, other federal courts of appeals, or the highest courts of any states, since there is absolutely no legal authority supporting the district court's bizarre and unprecedented theory of damages.

In fact, the court of appeals' rejection of the award of damages based upon a hypothetical "replacement cost" for common marine organisms, which naturally populate all appropriate habitats, is entirely consistent with the fundamental rule of damages quoted by plaintiffs in their cross-petition (p. 9):

> "Where property is destroyed by wrongful act, the owner is entitled to its money equivalent, and thereby to be put in as good position pecuniarily as if his property had not been destroyed." *Standard Oil Co.* v. *Southern Pacific Co.*, 268 U.S. 146, 155 (1925).

Since the "money equivalent" of valueless organisms, which are not protected by the Commonwealth and are free for the taking, is zero, the district court's award would have placed plaintiffs in a much more favorable position than they were in prior to the accident.[10] The court of appeals correctly vacated this unjust windfall to plaintiffs;[11] it should have applied the familiar "diminution rule" and dismissed plaintiffs' environmental claims in their entirety, since there is no evidence that the impacted property is any less valuable now than it was before the oil spill. (See the Reply Brief in No. 80-758 at 5).

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10. Moreover, in the absence of a statute providing for penalties for killing marine organisms, plaintiffs are not entitled to recover damages for loss of such organisms apart from damages for injury to their real property. The Puerto Rico statute cited by plaintiffs, Section 3 of the Fisheries Act of 1936, 12 L.P.R.A. § 43 (1978), which purports to impart to the Commonwealth ownership of all species of animals in the wild, cannot vest such power, for a state does not own wild animals found within its boundaries. *Cf.* Hughes v. Oklahoma, 441 U.S. 322 (1979).

11. There is no legal authority for awarding damages for injury to property having no market value, except for one's clothing and household goods of personal value. Contrary to plaintiffs' assertion, all the cases cited in footnote 9 in the cross-petition involved property with a proven market value. (Cross-Petition at 19).

Furthermore, the $5.5 million awarded by the district court for "replacement" of marine organisms was calculated on the basis of clearly erroneous findings of fact. When viewed in a light most favorable to plaintiffs, the evidence in the record could only support a finding that a few hundred marine organisms, mostly fiddler crabs and marine worms, were killed by the oil spill. Moreover, there is no evidence in the record of any permanent loss; the few marine organisms killed by the oil spill in 1973 may already have been spontaneously replaced by natural regeneration. Finally, there is absolutely no evidence that a market for the marine organisms exists or that they ever have been considered to have monetary value.

Thus even if this Court were to grant the cross-petition and reverse the court of appeals' ruling on the "replacement cost" theory, the $5.5 million award nevertheless would properly be vacated on remand on the contested questions of fact.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that plaintiffs' cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX I

Dr. Sorensen's Calculation of Damages for "Replacement" of Marine Organisms

		Station 2	Station 3	Station 4	Station 1
Data from UPR Supplemental Survey (A952, A955, A957, A959)					(not used)
Total Number of Organisms Found at "Control" Stations and at Most Heavily Oiled Locations at Bahia Sucia	"Control" (no oil)	45	87	30	14
	Bahia Sucia	0	0	1	36
Difference:		45	87	29	(22)

Sum: $45 + 87 + 29 = 161$ organisms

Average Difference: $161 \div 3 = 53.67$ organisms/station

Conversion from six 10 cm diameter cores to $1m^2$ (Conversion factor = 21.22):

53.67 organisms/station $\times$ 21.22* $= 1138$ organisms/m^2

Conversion from $1m^2$ to 1 acre (Conversion factor = 4047):

1138 organisms/$m^2 \times 4047 =$ 4,605,486 organisms/acre

Conversion from 1 acre to 20 acres:

4,605,486 organisms/acre $\times$ 20 = 92,109,720 organisms/20 acres

Damages for replacement of marine organisms:

$92,109,720 \times .06 =$ $5,526,583.20

(A1442-A1443)

*1. The 21.22 conversion factor from the area of the core samples to one square meter was derived by Dr. Lugo in his Report (A1428), as follows:

6 cores 10cm in diameter have an area of

$6 \pi r^2 = 6 \times 3.1416 \times 5 \times 5 = 471.24$ cm^2

$1m^2 = 100cm \times 100cm = 10,000$ cm^2

$$\text{Conversion factor} = \frac{10,000 \text{ cm}^2}{(471.24 \text{ cm}^2)\text{m}^2} = \frac{21.22}{\text{m}^2}$$

2. The conversion factor from the cores to 1 acre is
$21.22 \times 4047 = 85,877.34$

3. The conversion factor from the cores to 20 acres is
$21.22 \times 4047 \times 20 = 1,717,546.80$